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CHIN MIN HUA & ORS v. EAGAIVALLINAYAGI AMMAL

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[CIVIL SUIT NO: 22-761-2009]
20 MARCH 2023

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Abstract – *The hardship, mental anguish and emotional distress suffered are among the factors considered in assessing and awarding damages to a claimant who had been deprived of possession, use and rights to deal with land; especially one who had been dragged through years of legal battle.*

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DAMAGES: *Quantum – Assessment – Claim for damages – Losses of possession and use of land and opportunity to sell land – Claimant deprived of rights to deal with land – Protracted litigation – Claimant suffered hardship, mental anguish and emotional distress – Adequate damages to be awarded*

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The plaintiffs commenced an action at the High Court against the defendant in 2009, seeking, *inter alia*, an order for the specific performance of a contract for the sale and purchase of the defendant's land, an order that the defendant transfers the land to them and for damages. The defendant counterclaimed to have the plaintiffs' caveat on the land removed and for damages. The plaintiffs were successful in their claim and this prompted the defendant to appeal to the Court of Appeal. The appeal was allowed and the High Court's decision was set aside; a retrial was ordered. The plaintiffs appealed to the Federal Court but the appeal was dismissed. The plaintiffs were successful in the retrial and the defendant, again, appealed to the Court of Appeal. This time, the Court of Appeal allowed the defendant's appeal. Once more, the plaintiffs appealed to the Federal Court and the appeal was dismissed. After 14 years, the defendant got back her rights over the land. In the present claim, the defendant sought damages for: (i) the legal fees that she incurred; (ii) the loss of her opportunity to sell the land; and (iii) general damages for the loss of possession and use of the land.

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Held (awarding damages amounting to RM1.468 million):

(1) Legal fees and expenses should be a component of the damages awardable to the defendant. In other words, the legal fees incurred by the defendant, due to the acts or conduct of the plaintiffs, constituted the damages suffered by the defendant. The defendant incurred legal fees for approximately 14 years. The plaintiffs sued the defendant in 2009. When the plaintiffs sued the defendant, she had to get advice from her solicitors. She had to file not only her defence but also her counterclaim

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to remove the caveat and get her land back. The defendant went through two High Court trials, two Court of Appeal appeals, two motions for leave to appeal to the Federal Court and two Federal Court appeals. The defendant's total legal fees and expenses of RM368,000 for all the proceedings and tiers of the courts that she had to go through for the span of 14 years of litigation was fair and reasonable. The defendant was awarded the sum of RM368,000. (paras 46, 53, 54 & 55)

(2) The defendant could not deal with the land for 26 years – from 1996 to 2022. According to the defendant, in 2013, she had an offer to sell the land for RM1.3 million. The defendant was awarded RM700,000 (RM1.3 million less RM600,000) *ie*, for loss of opportunity to sell the land. (paras 57, 60 & 73)

(3) The defendant suffered hardship, mental anguish and emotional distress of being deprived of the right to deal with the land and, subsequently, the rights to possession and ownership of the land. In addition to that, the defendant suffered hardship, mental anguish and emotional distress of having to endure the protracted litigation and to finance it for 26 years, which was more than 1/3 of her adult life (she was almost 85 years old). The sum of RM400,000 was a reasonable sum to award the defendant with. (paras 90 & 104)

Case(s) referred to:

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***
Eagaivallinayagi Ammal v. Chin Min Hua & Ors [2020] 4 CLJ 64 CA ***(refd)***
Eu Sim Chuan v. Kris Angsana Sdn Bhd [2007] 7 CLJ 89 HC ***(refd)***
Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor [2007] 4 CLJ 293 CA ***(dist)***
Liew Choy Hung v. Shah Alam Properties Sdn Bhd [1997] 2 CLJ 601 SC ***(refd)***
Ling Peek Hoe & Anor v. Ding Siew Ching & Ors And Another Case [2022] 7 CLJ 412 HC ***(refd)***
Lo Foi v. Lee Ah Hong & Ors [1998] 1 CLJ Supp 244 HC ***(refd)***
MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai [2021] 6 CLJ 30 CA ***(refd)***
Ting Sieh Chung v. Hock Peng Realty Sdn Bhd [2012] 1 LNS 574 CA ***(refd)***
Yap Boon Hwa v. Kee Wah Soong [2019] 1 LNS 1157 CA ***(refd)***

Legislation referred to:

National Land Code, s. 329(1)

For the plaintiffs - Sunita Sankey & Vincent Tey; M/s Jublin Tan & Tey
For the defendant - Darshan & Samreet Sagoo; M/s Darshan, Syed, Amarjit & Partners

Reported by Najib Tamby

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JUDGMENT

Kenneth St James JC:

Prelusion

[1] This case demonstrates the perseverance of a defendant-litigant.

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[2] The plaintiffs sued the defendant in 2009 (14 years ago). The plaintiffs sought reliefs and remedies that included an order for the specific performance of a contract for the sale and purchase of the defendant's land, an order that the defendant transfers the land to them, and for damages.

C **[3]** The defendant counterclaimed to have the plaintiffs' caveat on the land removed, and for damages.

[4] After the first High Court (HC) trial, the plaintiffs won. The defendant appealed to the Court of Appeal (CA), in an endeavour to get her land back. The CA allowed her appeal, set aside the HC judgment and ordered a

D retrial.

[5] The plaintiffs applied for and obtained leave to appeal to the Federal Court (FC). The FC dismissed the plaintiffs' appeal.

[6] After the retrial, the plaintiffs won again. The defendant appealed

E again to the CA.

[7] The CA again allowed the defendant's appeal.

[8] The plaintiffs once more applied for and obtained leave to appeal to the FC. And again the FC dismissed the plaintiffs' appeal.

F **[9]** After 14 years, the defendant got back her rights over the land. She now seeks the assessment of her damages.

The Chronology Of Pertinent Facts

[10] In May 1996 (on 23 May 1996), the defendant (as seller) and Chin

G Teik Yoon (as buyer) entered into a sale and purchase agreement for the land (SPA). The purchase price was RM213,673.60.

[11] Chin Teik Yoon later died. The plaintiffs are the beneficiaries of Chin Teik Yoon's estate.

H **[12]** In August 1996 (on 16 August 1996), the plaintiffs lodged a caveat over the land.

[13] In October 2013 (on 11 October 2013) – the defendant was compelled to transfer the land to the plaintiffs to comply with the first HC judgment.

[14] On the same day (11 October 2013), the plaintiffs withdrew the caveat,

I so that the land could be transferred to the plaintiffs.

[15] It was not until January 2022 (on 24 January 2022), which was 26 years after the initial sale and purchase, that the land was finally transferred back to the defendant.

The Chronology Of Proceedings, In Brief

[16] December 2009 – the plaintiffs filed this suit. The reliefs included: the specific performance of the SPA; the vacant possession of the land; and damages. The defendant mounted a counterclaim. The reliefs sought in the counterclaim included: the removal of the plaintiffs' caveat; and for damages.

[17] September 2011 – after the first trial, the HC granted judgment in favour of the plaintiffs. The defendant appealed.

[18] May 2014 – the CA allowed the defendant's appeal and set aside the first HC judgment, and ordered a retrial.

[19] May 2015 – the FC granted leave to the plaintiffs to appeal to the FC.

[20] January 2016 – FC dismissed plaintiffs' appeal.

[21] June 2017 – After the retrial, the HC granted judgment in favour of the plaintiffs, and ordered specific performance of the SPA. The defendant again appealed.

[22] March 2018 – the CA allowed the defendant's appeal, set aside the HC judgment and ordered the defendant's damages to be assessed (second CA order).

[23] October 2019 – the FC granted leave to the plaintiffs' leave to appeal to the FC.

[24] December 2020 – the FC dismissed the plaintiffs' appeal.

Fundamental Principles Governing The Award Of Damages

[25] The fundamental principle on damages is that damages must be proven, and not merely asserted. This fundamental principle is reinforced in the FC case of *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269; [2014] 4 MLJ 465; [2014] 4 AMR 301 FC. The FC held:

> *[31] The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered.* The general principle governing the measure of damages has its origin in the words of Lord Blackburn in *Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 where he said:
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> > *... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.* (emphasis added)

[26] The defendant submitted her claim for damages in the following three heads of damage:

(i) the legal fees that she incurred;

(ii) the loss of her opportunity to sell the land; and

(iii) general damages for the loss of possession and use of the land.

The Legal Fees That The Defendant Incurred In Removing The Caveat And Getting Her Land Back

[27] The defendant submits that she should be compensated with the legal fees and expenses that she incurred, namely her legal bills. Her legal bills were incurred for resisting the plaintiffs' claim to take the land from her (through the claim for the specific performance of the SPA) and for counterclaiming to get her land back (through an order to remove the caveat and an order to return the land to her, and for the resultant damages).

[28] Firstly, the plaintiffs argue that according to the second CA order (dated 13 March 2018), only general damages are to be assessed. The plaintiffs' argued that legal fees are special damages and therefore should not be assessed.

[29] I find the plaintiffs' argument untenable. The terms of the second CA order include these terms:

(i) the defendant's appeal is allowed with cost;

(ii) the HC judgment is set aside;

(iii) the plaintiffs are ordered to remove the caveat which they entered on the land;

(iv) the plaintiffs are ordered to transfer the land back to the defendant;

(v) general damages ("ganti rugi am") are to be assessed.

[30] But in the CA's grounds of judgment, the CA pronounced that:

(i) the defendant's counterclaim is allowed;

(ii) the caveat is to be removed; and

(iii) "damages" are to be assessed (without a distinction being made as to "general damages" or "special damages").

[31] The citation for the CA's grounds of judgment is *Eagaivallinayagi Ammal v. Chin Min Hua & Ors* [2020] 4 CLJ 64; [2020] 2 MLJ 771. The CA held at p. 78 (CLJ); p. 788 (MLJ) that:

> [42] In the upshot, we had unanimously allowed the appeal by the defendant. The High Court order dated 9 June 2017 was set aside. The counterclaim was allowed wherein the caveat was to be removed and damages to be assessed by the judge. We also ordered that the transfer

of the MOT to be executed within 30 days from the date of our decision, failing which, the senior assistant registrar is to execute the MOT. Costs of RM40,000 for here and below, subject to allocator fees and the deposit to be refunded.

[32] Although the second CA order stated that 'ganti rugi am' are to be assessed, and the CA's grounds of judgment stated that 'damages' are to be assessed, I do not think that it is necessary nor is it helpful to analyse and deliberate whether the CA ordered only general damages to be assessed, and in this context, whether the defendant's legal fees incurred comes under general damages or special damages. The CA ordered the defendant's damages to be assessed.

[33] The CA clearly ordered the caveat be removed and for damages to be assessed for the loss and damage caused by the caveat. I find that I should adhere to general principles and assess the loss and damage that the defendant suffered based on the evidence.

[34] At this juncture, I would like to make a remark about one of the points of argument that both parties presented in the context of sub-s. 329(1) of the National Land Code (NLC).

[35] Subsection 329(1) is set out below for reference:

Section 329. Compensation for wrongful caveats, and limitation on repeated applications.

(1) **Any person** or body **who, wrongfully** or without reasonable cause, secures the entry of, or fails to withdraw, **any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss**. (emphasis added)

[36] Both sides were arguing over the applicability of sub-s. 329(1) of the NLC. The defendant submitted that as the CA ordered the caveat to be removed, she should be given the statutory damages under sub-s. 329(1) that relates to the entry of caveats.

[37] The plaintiffs, on the other hand, argue that to grant damages under sub-s. 329(1), there must first be an express finding by the CA that the caveat was wrongfully entered. The plaintiffs argue that if there is no such express finding, then damages cannot be assessed for the caveat being on the land.

[38] The parties also argued over the applicability of the case law authorities on sub-s. 329(1) of the NLC. The case law authorities cited and argued over by the parties include the case of *Ting Sieh Chung v. Hock Peng Realty Sdn Bhd* [2012] 1 LNS 574; [2013] 2 MLJ 90; [2012] AMEJ 0141 and the case of *Lo Foi v. Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244; [1997] MLJU 310; [1997] AMEJ 0034.

[39] The parties argued over whether the caveat was rightfully entered, or entered "wrongfully or without reasonable cause" (referring to the words used in sub-s. 329(1)). The parties also argued over whether the plaintiffs had a caveatable interest when they entered the caveat.

[40] In the midst of arguments, however, the parties conceded that these issues were never canvassed before the CA when the CA granted the second CA order in the defendant's favour.

[41] I find that these arguments by the parties revolving around the applicability of sub-s. 329(1) would entail going behind the second CA order to consider issues such as whether the caveat was entered rightfully or wrongfully, or whether the plaintiffs had a caveatable interest.

[42] I therefore find that to assess the damages in this suit, it is unnecessary to consider and determine these issues. These issues that relate to sub-s. 329(1) of the NLC are, to me, extraneous to this assessment of damages proceeding.

[43] The CA adjudged (and affirmed by the FC) that the plaintiffs' caveat on the land must be removed and the land is to be transferred back to the defendant, and that the defendant's damages are to be assessed. The CA already found the plaintiffs liable to pay damages. What I have been entasked to do is to assess, that is, to quantify the amount of damages that the plaintiffs have to pay the defendant.

[44] And to perform this task of assessing damages, I go back to fundamental principles such as:

(i) the purpose of awarding damages is to place the defendant back in the position that she would have been in if the plaintiffs did not sue her for the land – *Liew Choy Hung v. Shah Alam Properties Sdn Bhd* [1997] 2 CLJ 601; [1997] 2 MLJ 309; [1997] 3 AMR 2145; and

(ii) the loss and damage resulting in damages must not be too remote – *Lo Foi* (*supra*).

[45] Coming back to this head of damage of legal bills incurred – the defendant produced seven legal bills, with dates from May 2014 to December 2020. The total amount of the bills is RM368,000.

[46] Considering the factual circumstances of this suit, I am of the view that legal fees and expenses should be a component of the damages awardable to the defendant. In other words, the legal fees incurred by the defendant, due to the acts or conduct of the plaintiffs, constitute the damages suffered by the defendant.

[47] The authorities that I am both guided by and bound to follow, include:

(i) *Yap Boon Hwa v. Kee Wah Soong* [2019] 1 LNS 1157; [2020] 1 MLJ 37; [2019] AMEJ 0938;

(ii) *MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai* [2021] 6 CLJ 30; [2021] 5 MLJ 408; [2021] 4 AMR 16; and

(iii) *Ling Peek Hoe & Anor v. Ding Siew Ching & Ors And Another Case* [2022] 7 CLJ 412; [2022] MLJU 157; [2022] AMEJ 0398.

[48] In *Yap Boon Hwa* (*supra*), the CA held that legal expenses incurred in litigation are recoverable as damages. The CA (through Justice Zabariah Yusof) stated:

> *[2] … We allowed damages to the respondent/defendant, in the form of the claim for legal fees incurred in defending the action* of fraudulent misrepresentation.
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> …
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> *[24] … Having to defend the suit, to pursue the counterclaim, to prove the fraudulent misrepresentation of the second plaintiff* and in bringing witnesses for the trial had resulted in the defendant having to incur legal expenses and fees. Hence such expenses are reasonable and recoverable.
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> (emphasis added)

[49] In *MD Biomedical* (*supra*), the CA (through Justice Lee Heng Cheong):

(i) distinguished the costs of court proceedings from damages as a remedy in the proceedings;

(ii) propounded that where a party caused the other party to incur legal fees, the legal fees can constitute damages that are awardable to the successful party in addition to costs.

[50] The CA enunciated:

> [29] … we find that the plaintiff's sole claim for 'total legal fees and disbursements of RM70,000' comes within the meaning of 'the tortious damage' and the 'forseeability test' as defined by *Lo Foi v. Lee Ah Hong & Ors* and that *the claim for the legal fees is not too remote*.
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> …
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> *[32] Had the defendant not lodged the caveat against the lands, the plaintiff would not have to expend legal expenses to protect and safeguard its legitimate interests in the lands*. These are expenses which the plaintiff was constrained to incur if not for the defendant's entry of wrongful caveats against the lands …
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> …
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> [35] In any event, we are of the view that the plaintiff's *payment of legal fees amounting to RM70,000, is 'actual damage' suffered by the plaintiff in that the plaintiff had to incur this sum to remove and protect his interests in the lands and this is legitimately one of the heads of damages which an aggrieved person such as the plaintiff herein may claim* … (emphasis added)

[51] In *Ling Peek Hoe* (*supra*), the HC (Justice Su Tiang Joo), after lucidly analysing the authorities, held that:

> [78] The above authorities have made it clear that **legal fees are a specie of special damages which are claimable over and on top of costs**.
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> (emphasis added)

[52] I therefore find that the defendant's legal fees and expenses were directly and foreseeably caused by the actions and conduct of the plaintiffs. I hence award these sums as damages, in addition to the costs that were awarded to her.

[53] The defendant incurred legal fees for approximately 14 years. The plaintiffs sued the defendant in 2009. When the plaintiffs sued the defendant, she had to get advice from her solicitors. She had to file not only her defence but also her counterclaim to remove the caveat and get her land back. She went through two HC trials, two CA appeals, two motions for leave to appeal to the FC, and two FC appeals.

[54] In this assessment of damages proceeding, during the defendant's cross-examination, the plaintiffs did not put to the defendant that the legal fees incurred by her all these years of litigation were unreasonable or exorbitant.

[55] I find that the defendant's total legal fees and expenses of RM368,000 for all the proceedings and tiers of the courts that she had to go through for the span of 14 years of litigation, is fair and reasonable. I therefore award the defendant the sum of RM368,000 under this head of damage.

Loss Of Opportunity To Sell The Land

[56] The plaintiffs argue the same points under this head of damage.

[57] The defendant could not deal with the land for 26 years – from 1996 to 2022. The plaintiffs entered the first caveat over the land in 1996. The defendant was compelled to transfer the land to the plaintiffs in 2013. The land was eventually transferred back to the defendant in 2022.

[58] In the body of evidence is the international valuers: Henry Butcher Malaysia's valuation report on the land. The report was dated 27 January 2015. Henry Butcher valued the land in January 2015 at RM1.5 million.

[59] Even though the defendant did not refer to this 2015 valuation report in her witness statement (examination-in-chief), her counsel represented to me that this 2015 valuation report was produced as evidence at the second HC trial, and was marked as exh. "D38". Plaintiffs' counsel did not object to this representation. So, I take it that the 2015 valuation report is part of the body of evidence in this suit.

[60] The defendant testified that in 2013, she had an offer to sell the land for RM1.3 million. She testified that she wanted to, but could not, sell the land at the time (in 2013) because the caveat was on the land, and the case was still in the midst of litigation – refer the defendant's witness statement, Q&A 12.

[61] The defendant testified, with supporting documentary evidence, that she sold the land in July 2022 for RM600,000.

[62] In re-examination, the defendant reiterated that she could not sell the land in 2013 for RM1.3 million because of the caveat. She testified that if she could have sold the land in 2013, she would have received more money *ie*, RM1.3 million, compared to the price of RM600,000 that she eventually sold the land for.

[63] The defendant also testified that she had to sell the land at the low price of RM600,000, because her "health is not good". She testified that if she could have sold the land in 2013, she would have received more money. But instead, she suffered a loss. In her own words, she was "suffering loss", and "I really lost on this".

[64] The land was transferred back to the defendant in January 2022. By July 2022 (just six months after), the defendant had already sold her land for RM600,000. This, to me, is supporting evidence that instead of waiting for the property market to recover after the pandemic and for the land to appreciate in value over time – she wasted no time to sell her land because she needed the money.

[65] The plaintiffs did not make sufficient challenge to this evidence of the 2013 offer to sell at RM1.3 million. In cross-examination, plaintiffs' counsel asked the defendant to produce evidence of this RM1.3 million offer. The defendant testified that she could not find a witness to testify to this fact. She conceded that she could not produce the documentary evidence of this offer.

[66] The plaintiffs were calling on the defendant to produce corroboration evidence and documentary evidence about the RM1.3 million offer in 2013. But the defendant gave *viva voce* (oral) evidence about this offer. And the plaintiffs have given me no material or ground to doubt her credibility or her probity.

[67] Also, the plaintiffs did not produce any rebuttal evidence to show that the market value of the land in 2013 is nowhere near RM1.3 million, such as a valuation report on the value of the land in 2013.

[68] I therefore find, on the balance of probabilities, that the defendant's evidence is sufficient to prove that there was an offer in 2013 for her to sell the land for RM1.3 million.

[69] To my mind, there are two alternative computations for the defendant's damages under this head of damage. One alternative is to take the 2013 offer to sell the land at RM1.3 million and deduct from this sum the RM600,000 that she ended up selling the land for in July 2022, namely RM1.3 million less RM600,000 = RM700,000.

[70] The second alternative is to take the 2015 Henry Butcher valuation of the land at RM1.5 million and deduct the same sum of RM600k that she sold her land for, that is, RM1.5 million less RM600k = RM900k.

[71] I am of the view that the RM1.3 million sum should be used, and not the RM1.5 million. The evidence of the RM1.3 million is, to me, more applicable and pertinent to the issue of loss and damage. The Henry Butcher RM1.5 million valuation is just evidence that the value of the land in 2015 was RM1.5 million. It is not evidence that the defendant was offered to sell the land at RM1.5 million in 2015.

[72] Also, to use the RM1.3 million sum is more conservative and hence more appropriate.

[73] And so, I assess the defendant's damages under this head of damage at RM1.3 million less RM600,000 = RM700,000. I award damages of RM700,000 to the defendant under this head of damage.

General Damages

Discounting Or Disregarding Damages For A Period Of Time

[74] The plaintiffs concede that general damages are payable, but argues that there should be a period of time that I should discount or disregard from the assessment of the quantum of damages. That period, submits the plaintiffs, is from (i) the date of the caveat entry (16 August 1996) to (ii) the date the plaintiffs withdrew the caveat to permit the defendant to transfer the land to the plaintiffs in 2013 (11 October 2013). (The defendant was compelled to transfer the land to the plaintiffs pursuant to the HC judgment after the first HC trial).

[75] The plaintiffs argue that since the caveat was the cause of the loss and damage, damages must stop as soon as the caveat was withdrawn.

[76] With respect, I do not comprehend the legal rationale behind this argument. The caveat impeded the defendant from dealing with and using the land. The plaintiffs withdrew the caveat just so that they could acquire the land, so that the land could be transferred to them. When the defendant, in compliance with the HC judgment, transferred the land to the plaintiffs, she lost the land to the plaintiffs. It was a much worse circumstance than having a caveat on her land.

[77] In effect, the plaintiffs want to take credit for withdrawing the caveat. They are asking for the loss and damage that they caused to the defendant to be, in the plaintiffs' words, "discounted or disregarded" by their act of withdrawing the caveat. With respect, I find no favour in this argument.

[78] The defendant suffered the hardship, mental anguish and emotional distress throughout the period from when the caveat was entered in 1996, and then the land was transferred in 2013, until the land was eventually transferred back to her in 2022. She could not deal with, or use, the land for the entire 26-year period.

[79] The plaintiffs have another argument about how I should discount or disregard any loss and damage attributable to the plaintiffs for a period of time. The plaintiffs argue that the defendant's counterclaim was filed in July 2010. The first HC judgment after the first HC trial was in favour of the plaintiffs. It was granted in September 2011 (19 September 2011). So, the plaintiffs argue that the first caveat was rightfully entered, until the first CA order reversed the first HC judgment. The first CA order that reversed the first HC judgment was made in May 2014 (12 May 2014).

[80] The plaintiffs argue that the defendant's damages should be lowered for this period, because in this period of time – after the first HC judgment until the first CA order, which reversed it – the caveat was deemed rightfully entered. And if the caveat was deemed rightfully entered in this period, the defendant's damages should be discounted or disregarded for this period.

[81] Put differently, the plaintiffs submit that for as long as the first HC judgment was in favour of the plaintiffs, and by extension, for as long as the second HC judgment was in favour of the plaintiffs (even though on both occasions the HC judgments were found by the CA to be wrong) – the defendant suffered no damages.

[82] Again, with respect, I do not comprehend the legal rationale of this argument. On both occasions (or periods of time), the CA, on the merits, found against the plaintiffs, and found in favour of the defendant.

[83] The plaintiffs are effectively submitting that the defendant suffered loss and damage in intervals. The plaintiffs submit that in the period of time that the first HC judgment was in effect, before it was reversed by the first CA order, and in the period of time that the second HC judgment was in effect, before it was reversed by the second CA order – this court should not award damages to the defendant. I am of the respectful view that this argument is somewhat artificial.

[84] The factual truth of the matter is that the defendant lost her right to deal with and to use the land for as long as the plaintiffs' caveats were in place. And then the defendant additionally lost possession and ownership over the land after she was compelled to transfer the land to the plaintiffs. I see it as a continuous loss and damage, for which she should be reasonably compensated.

[85] The plaintiffs also argue that the defendant had a duty to mitigate her loss and damage, but that she did not so mitigate. But the plaintiffs do not point out how or in what manner the defendant could have mitigated her loss and damage.

[86] I find that as the defendant could not deal with the land from 1996 until 2013 (for 17 years) – due to the caveat – the defendant was in no position to mitigate her losses.

[87] The defendant had to transfer the land to the plaintiffs in October 2013 (11 October 2013). The land was eventually transferred back to her in January 2022 (24 January 2022). Over and above not being able to deal with the land for 17 years (due to the caveat), the defendant even lost possession and ownership of the land for eight years and three months.

[88] As the defendant lost possession and ownership of the land from 2013 to 2022 – because she had to transfer the land to the plaintiffs – the defendant was in no position to mitigate her losses.

[89] From the original sale transaction, the defendant only received RM21,367.36, which was the initial 10% of the original purchase price of RM213,673.60. Although all she ever received was this RM21,367.36, by the plaintiffs' action and conduct, the defendant lost her rights to deal with the land, and she lost her rights to possession and ownership of the land, for 26 years.

[90] I find that the defendant suffered the hardship, and the mental anguish and emotional distress of being deprived of the rights to deal with the land and subsequently the rights to possession and ownership of the land. I also find that the defendant suffered the hardship, and the mental anguish and emotional distress of having to endure the protracted litigation, and to finance it, for 26 years, which is more than 1/3 of her adult life. (She is almost 85 years old.)

[91] There is case law authority on the amount of damages that was awarded to a successful party in circumstances that were somewhat similar to this suit. The case is *Eu Sim Chuan v. Kris Angsana Sdn Bhd* [2007] 7 CLJ 89; [2007] 1 MLJ 734; [2007] 2 AMR 81.

[92] In that case, the husband-and-wife plaintiffs owned a double-storey bungalow. In March 1997, the defendant-company started to develop the land next to the plaintiffs' property. The defendant-company was constructing two 20-storey condominium blocks. The construction work caused damage to the plaintiffs' property, including the house. There were cracks on the house, the electrical systems failed and the water supply was badly affected.

[93] The damage was so severe that the plaintiffs and their family were compelled to move out. The house was not safe to live in. It was found that the plaintiffs suffered "severe mental distress and hardship". The health of the husband-plaintiff was also badly affected.

[94] In *Eu Sim Chuan* (*supra*), the HC (Justice Azmel) held, at p. 100 (CLJ); p. 743 (para. [20](8)) (MLJ):

> (8) General Damages for mental distress, hardship etc
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> There are ample evidence that **the damage to the property had caused severe mental distress and hardship to the plaintiffs thereby resulting in the health conditions of the second plaintiff to deteriorate drastically**. The whole members of the plaintiffs' family had faced great hardship, getting transferred from one house to another. The first plaintiff, who had personally supervised the construction of the house, must be feeling very painful and sad to see the house being damaged due to the activities carried out by the defendant. I allow the claim of RM1,000,000 under this Item. (emphasis added)

[95] The defendant-company in *Eu Sim Chuan* (*supra*) appealed to the CA. The CA upheld the HC judgment. In particular, the CA affirmed the HC's award of RM1 million for "mental distress and hardship". The CA, in appeal case citation of *Kris Angsana Sdn Bhd v. Eu Sim Chuan & Anor* [2007] 4 CLJ 293; [2007] 5 MLJ 13; [2007] 4 AMR 195 held:

> [40] What was left for consideration was the issue of damages and the quantum ... *The injury suffered by the respondents here was certainly not remote as it was of a kind any reasonable man could have foreseen*. Guided by that principle the learned judge had accordingly ordered damages in the sum of RM6,306,242.43 against the appellant, with interest at the rate of 8% pa, on the amount awarded from the date of filing the suit to the date of realisation.
>
> ...
>
> [42] Before proceeding further, it is necessary to state that *the underlying object for the assessment of damages is to put an aggrieved party in the same position as he had occupied, prior to the time when the wrong was done on him* (see *Dodd Properties (Kent) Ltd & Anor v. Canterbury City Council & Ors* [1980] 1 All ER 928; *Liew Choy Hung v. Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309). For special damages, losses which are actual, and unavoidable, invariably monetary awards too will be ordered so as to compensate him.
>
> ...
>
> [44] *We found no error in the findings of the learned judge when he had ordered RM1,000,000 also as part of the general damages. Practitioners are well aware that general damages represent losses which are not easily quantifiable, with losses in the like of mental stress, hardship etc. as suffered by the respondents, also falling under the heading*. There was ample evidence to show that the health of the

second respondent indeed had taken a dive, due to the continuous and persistent mental distress of seeing their home slowly disintegrating, followed by further hardship when moving house.

(emphasis added)

[96] The distinguishing facts between *Eu Sim Chuan* (*supra*) and this suit is that the successful plaintiffs there resided in the bungalow on their land. The bungalow was damaged, to the extent that it was not safe to live in it. The plaintiffs there and their family had to move "from one house to another".

[97] In this suit, the defendant did not have her home on the land. The defendant did not live there. But the hardship, mental anguish and emotional distress that the defendant experienced are undeniable.

[98] But, as distinct from the facts in *Eu Sim Chuan* (*supra*), the defendant suffered the additional hardship, mental anguish and emotional distress of the protracted litigation. In other words, the long period of time that the defendant lost the right to deal with the land, as well as the right to possession and ownership of the land, would have caused her additional hardship, mental anguish and emotional distress.

[99] The plaintiffs lodged the first caveat over the land in August 1996. This dispute between the parties started then. Since August 1996, the defendant could not deal with the land.

[100] The plaintiffs filed this suit in December 2009. It did not even conclude when the second CA order was finally made in the defendant's favour. There was still this assessment of damages proceeding yet to be determined. It finally ended when this award of damages was made in January 2023 (on 26 January 2023).

[101] The defendant suffered the hardship, and the mental anguish and emotional distress of more than 26 years of dispute and uncertainty (from 1996 to early 2023). Within the 26 years of dispute and uncertainty, there were over 13 years of prolonged litigation in all the tiers of the superior courts.

[102] The trial had to be conducted twice. There were two appeals at the level of the Court of Appeal. There were two motions for leave to appeal to the FC. There were two Federal Court appeal hearings. The litigation was still ongoing until the determination of this assessment of damages proceeding, which I consider to be part-and-parcel of this suit.

[103] Further, after receiving the small initial sum of RM21,367.36, the defendant endured the hardship, mental anguish and emotional distress of having to make outlay-after-outlay to finance the legal proceedings to recover her rights over her land.

[104] Guided by the case of *Eu Sim Chuan* (*supra)*, and its affirmation by the CA in *Kris Angsana* (*supra)*, it is my considered view that the sum of RM400,000 is a reasonable sum to award the defendant for suffering the hardship, mental anguish and emotional distress for the loss of the right to deal with the land, and for the loss of the use, possession and ownership of the land, for 26 years.

Conclusion

[105] In conclusion, under the head of legal fees and expenses, I award the sum of RM368,000. Under the head of the loss of opportunity to sell the land, I award the sum of RM700,000. And under the head of general damages, I award the sum of RM400,000. I assess the total amount of damages at RM1.468 million.

[106] I order costs of RM15,000 to be paid by the plaintiffs to the defendant by 24 February 2023.

Error In The Order For Interest

[107] I ordered interest at 5% per annum on the quantum assessed from the date of the second CA order, which was 13 March 2018, until full payment.

[108] But I realise now that this was a mistake. I should not have ordered interest to run from the date of the second CA order until full payment, because the quantum of damages has yet to be determined then. I should have, instead, ordered interest at 5% per annum on the quantum assessed *ie*, RM1.468 million from the date of this order/award of damages, which was 26 January 2023, to the date of full payment.

[109] I therefore invite the Court of Appeal to correct my error so that interest will be calculated from the date of this order/award for damages *ie*, from 26 January 2023, until the date of full payment.